appeal from the High Court; and if they were applicable they would have been in conflict or inconsistent with the provisions of sections 42 and 17 of the Courts Ordinance, 1948, and by virtue of section 109 of the Courts Ordinance, 1948, superseded. The relevant provisions are sections 42 and 17 of the Courts Ordinance, 1948.

The source of these two sections is to be found in rules 16 and 17, respectively, of Order 58 of the English Rules of the Supreme Court. The effect of these two rules was fully considered in *Cropper v. Smith*[1]. There it was held that Order 58, rule 16, gives concurrent jurisdiction to the Court below and to the Court of Appeal as to stay proceedings pending an appeal; that rule 17 does not take away any of the jurisdiction thus given to the Court if an application has first been made to the Court below. Brett M.R. said (at p. 308):—

"That (rule 17) imposes a limitation on the action of the Court of Appeal, but a limitation not affecting its jurisdiction, and does not at all show that the motion in the Court of Appeal is an appeal. On the contrary, the 17th rule seems to me to first assume, as the 16th rule did, that it is not an appeal, that there is an alternative jurisdiction, and alternative jurisdiction is of course co-ordinate. Then in order that the Court of Appeal and the Court below may not incur the risk of deciding in different ways as to staying proceedings without either of them knowing of the application to the other, the rule imposes this limitation, that although the jurisdiction is co-ordinate, and although it is alternative, yet the Court of Appeal will not exercise its jurisdiction until it knows whether the co-ordinate jurisdiction of the Divisional Court has been exercised and how. That seems to me to be the true reading of the 17th rule."

And Cotton L.J. (at p. 313) said:—

"The 16th rule of Order LVIII provides that an appeal shall not stay the execution of the decree appealed from, except so far as the Court below or the Court of Appeal may so order. That undoubtedly gives co-ordinate jurisdiction to the Court below and the Court of Appeal, and if it stood alone this Court might without any application having been made to the Court below, entertain an application to stay proceedings as distinguished from an application to grant an injunction for the protection of the property pending the appeal. But then rule 17 provides that where the application may be made under any of the rules either to the Court below or to the Court of Appeal, then it shall be made in the first instance to the Court below. That prevents this Court from entertaining an application to stay proceedings until a similar application has been made to and refused by the Court below."

Following this authority I hold that while this Court has co-ordinate jurisdiction with the Court below this Court will not exercise its jurisdiction until a similar application has been made to and refused by the High Court.

The application must, therefore, be dismissed, with costs.

Application dismissed.

Solicitors: *Lovelace & Hastings; Braddell & Ramani.*

LEE SIEW EAN v. REG.

[A. Cr. J. (Spenser Wilkinson J.) November 15, 1955]

[Penang — Criminal Appeal No. 44 of 1955]

Women & Girls Protection Ordinance (Cap. 33), s. 8(b) — Knowingly permitting premises to be used as a brothel — Definition of brothel

The appellant in this case was convicted of an offence under s. 8(b) of the Women and Girls Protection Ordinance in that being the occupier of No. 2B Irving Road, Penang she knowingly permitted the said premises to be used as a brothel. There was evidence in this case that at least three of the four rooms in the house had been sublet by the appellant. There was also evidence that the other room was also used by a prostitute.

Held: (1) as the appellant had sublet the three rooms she ceased to be the tenant in occupation of them and therefore she could not be found guilty of allowing them to be used as a brothel; (2) the learned Magistrate was wrong in finding that the premises were used by two or more persons for the purpose of prostitution and therefore the conviction must be quashed.

Cases referred to:—

(1) *Michi & Anoyu v. R.* (1934) M.L.J. 11.
(2) *Tan Poh Whatt v. Public Prosecutor* (1940) M.L.J. 172.
(3) *Tay Kiar Kiar v. R.* (1950) M.L.J. 173.
(4) *Siviour v. Napolitano* (1931) 1 K.B. 636.
(5) *Lam Ah Fong v. R.* Penang — Criminal Appeal No. 48 of 1948 — unreported.

MAGISTRATE'S APPEAL.

Lim Kean Siew for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J.: — The appellant was charged under paragraph (b) of Section 8 of the Women and Girls Protection Ordinance with being the occupier of No. 2B, Irving Road. Penang she knowingly permitted the said premises to be used as a brothel.

There was some evidence that at least three of the rooms in this house had been sub-let by the appellant and the main ground of appeal was that the charge having been laid under paragraph (b) of section 8 confusion had arisen throughout the case as to whether the rooms which had been sub-let had been used for the purposes of prostitution or whether the one room which had not been sub-let had been so used. If the sub-let rooms had been so sub-let by the appellant with the knowledge that they were or were to be used as a brothel or if she was wilfully a party to the continual use of such rooms as a brothel then she would have been guilty of an offence under paragraph (c) of the section. As long, however, as she was charged under paragraph (b) any rooms which had

been sub-let ceased to be within the appellant's occupation and what went on in those rooms could not be used as evidence in respect of a charge under paragraph (b).

With regard to the facts it appears to me that the learned Magistrate has misdirected himself in two respects. Towards the end of his grounds of decision having pointed out that there was one room which was not sub-let to anyone he goes on to say :—

"With regard to the question of user, there is evidence that this particular room was to be used by other couples. In this connection Constable Abu Bakar in his evidence said:— '. . . . . She lifted up her gown upwards. She laid herself on the bed. She told me 'if you want to do, do it quickly. This room will be occupied by someone else'."

I must point out, however, that in my opinion this alleged statement by the witness Soon Ann was not evidence of the facts therein stated. The witness Soon Ann herself denied doing or saying what was attributed to her by Constable Abu Bakar and therefore the constable's evidence as to what she said could only be used to discredit the evidence of Soon Ann and not as independent evidence of the facts stated in the alleged statement.

The other misdirection is to be found in the following paragraph in the Magistrate's grounds of decision :—

"There must, therefore, be two or more women or girls before the house in question became a brothel. Learned Counsel submitted that, according to the evidence, only Fatimah and Soon Ann were using the house in question, and that since Fatimah was a sub-tenant, she could not be taken into consideration in making up the number. But what about the other three ladies under the same cherry tree? I think they could be taken into consideration.

The learned Magistrate appears to have overlooked a point, which was also, I think, overlooked by the Police in preparing the case. There was clear evidence that the yard in which the cherry trees stood was common to the premises 2A, Irving Road and 2B, Irving Road. It is not permissible to draw inferences adverse to an accused person on facts which equally suggest other inferences. There was evidence from a Police witness who had kept observation on these premises that women with men frequently entered the premises 2B from this yard but also that they sometimes went to 2A. Even if this was evidence of habitual user of the premises 2B there is nothing to show that the rooms used in 2B on these various occasions were not the rooms which were sub-let; and there is nothing to show that the three ladies under the cherry tree referred to by the learned Magistrate were waiting to enter 2B rather than 2A. In my opinion, therefore, it is not permissible to take these people into consideration in order to make up the number of persons using the one room from one to more, so as to satisfy the statutory definition of a brothel.

There are various local authorities dealing with the provisions of Section 8 of the Women and Girls Protection Ordinance. In the case of *Michi and Anoyu v. Rex*[1] Sproule Ag. C.J. held that the user proved under the Ordinance must be habitual user. He remarks in his judgment in that case that the definition of a brothel contained in the Ordinance makes it much more difficult to apply locally the line of cases concerning allowing of strangers to use the premises of an accused for acts of prostitution.

In *Tan Poh Whatt v. Public Prosecutor*[2] Poyser C.J. said :—

"It has been held in **Michi and Anoyu v. Rex**[1], that 'proof of a solitary instance of user by two or more women or girls is not sufficient to sustain a conviction. The user must be habitual in either case, not a mere solitary act.' I think that case was correctly decided, and if it was, this appeal must be allowed; but whether it was or not, the evidence in this case was not in my opinion sufficient to establish the necessary guilty knowledge of Tan Choon, an essential part of the offence, and the appeal must therefore be allowed."

I would here remark that in the case now before me I was not at all sure that there was sufficient evidence of guilty knowledge on the part of the appellant, although I did not decide the appeal on that ground.

In *Tay Kiar Kiar v. Rex*[3] it was held following the English case of *Siviour v. Napolitano*[4] that as there was a sub-letting the appellants could not be found guilty of allowing the premises to be used as a brothel.

Finally, Counsel for the appellant referred me to an unreported decision of Bostock Hill J. in *Lam Ah Fong v. Crown*[5]. The following passage from the judgment sets out concisely the facts of that case : —

"The learned Magistrate accepted all the prosecution evidence which, together with appellant's own evidence, established the following facts:— (1) The appellant was the chief tenant of the said premises which contained a number of rooms; (2) She occupied one room herself and let out other single rooms to a number of prostitutes; (3) On the night in question at least four of these women were in their rooms with undressed or scantily-clad men and admitted that they were prostitutes. I accept the finding of the learned Magistrate that accused had knowledge that the sub-tenants were using their rooms for the purposes of prostitution."

One of the grounds of appeal in that case was that *Siviour's*[4] *case* could be distinguished on the ground that there the accused was charged with knowingly permitting part of the prenises to be used, whereas the accused was in fact charged with knowingly permitting the whole of the premises to be used as a brothel. Dealing with this point the learned Judge says :—

"As regards Mr. Wylie's first ground I am unable to see that it affects the case. Allowing that the appellant in this case did use her own room for the purposes of prostitution, that alone would not make the premises a brothel within the definition of the Ordinance. And as regards the other rooms she is in the same position as was the respondent Napolitano in Siviour's case. In other words the elements of 'immediate control' and 'occupation' are lacking because she is not, after subletting the said rooms, the tenant in occupation of them."

The facts of the case now before me are so similar to the facts of that case that I feel bound to follow it; and I feel that had this unreported judgment been cited to him the learned Magistrate's decision might have been different.

The learned Deputy Public Prosecutor urged upon me that the evidence of Prosecution Witness No. 6, Fatimah binti Talib to the effect that she had rented her room from the accused was unsatisfactory in that she stated that she visited 2B, Irving Road only on that night and did not know whether the appellant was the chief tenant. This witness, however, was a prosecution witness and her evidence with regard to the sub-letting was corroborated by the evidence of the appellant. Even if it be a fact that she had only entered upon the sub-letting that very morning this would not in my opinion alter the position in law. The fact that she left the premises after the Police raid is really not surprising and does not in my view prove anything. It is also to be observed that the learned Magistrate who saw and heard the witnesses appears to have accepted as a fact that this particular room had been sub-let.

I therefore allowed the appeal and quashed the conviction.

Appeal allowed.

Solicitors for the appellant: *Lim, Lim & Oon.*

KOAY TEIK CHOO & ORS. v. REG.

[A. Cr. J. (Spenser Wilkinson J.) November 25, 1955]
[Penang — Criminal Appeal No. 46 of 1955]

Penal Code ss. 448 & 452 — House-trespass after preparation made for causing hurt — Burden of proof — Misdirection.

This was a case which arose from a quarrel between two families which eventuated in a fight. The learned Magistrate convicted the appellants of the offence of house-trespass after preparation made for causing hurt. In doing so he appeared to have wholly accepted the prosecution version of the facts and to reject entirely the defence version.

Held: (1) the learned Magistrate appeared to have used the wrong approach in this case, that is he approached the case upon the basis of which of two conflicting stories he should believe; (2) on the facts there was evidence of provocation on the part of the complainant and his family and therefore the conviction should be altered to convictions under s. 334 of the Penal Code in the case of the 1st and 3rd appellants; (3) there was no evidence that the 2nd appellant did anything in this case and therefore he should be acquitted.

Case referred to:—

(1) *Mohamed Yatin v. Public Prosecutor* (1950) M.L.J. 57; 1 M.L.R. 7.

MAGISTRATE'S CRIMINAL APPEAL.

Eusoffe Abdoolcader for the appellants.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J. : — This appeal concerns a quarrel between two families which eventuated in a fight. The history of the case is somewhat unfortunate in that the charges preferred were really unsuited to the circumstances. The original charge was house-trespass with intent to cause hurt under section 448 of the Penal Code. This was amended when the trial began to a charge of house-trespass after preparation made for causing hurt under section 452 of the Code. In my opinion, however, the real complaint was causing hurt and indeed the prosecution in the Court below appears to have been conducted and presented the case substantially as a case of causing hurt, the evidence regarding the alleged preparation having been given quite incidentally in the course of long descriptions of an actual fight.

The result of charging the offence in this way was that difficult questions of law arose as to whether there was technically a house-trespass and whether or not there was preparation for causing hurt, with the result that the real issues of fact tended to become obscured. I do not know whether the learned Magistrate considered amending the charge at the close of the case for the prosecution, but I cannot help feeling that the trial would have been more satisfactory had he amended at that stage. At the hearing of the appeal the learned Deputy Public Prosecutor conceded that the case was more properly one of causing hurt and therefore the questions of law I have mentioned were not argued before me and the appeal proceeded mainly upon the questions whether upon the evidence the learned Magistrate was justified in convicting and whether or not he had misdirected himself upon the facts or upon the burden of proof.

The 3rd appellant having himself received sufficient injuries during the incident to keep him in hospital for three days made the first report to the Police and subsequently made a complaint to a Magistrate. What action, if any, has been taken on that complaint, I do not know and I have not inquired; but as there may be further proceedings in regard to this incident I prefer in this judgment to say as little about the facts as possible. The absence of any detailed comment upon the facts, however, must not be taken to mean that I have not given the very fullest consideration to the arguments put before me in this appeal and to the grounds of decision of the learned Magistrate.

Two questions of fact, however, must be touched upon. There is no doubt upon the evidence that the complainant and his nephew both received hurt at the hands of the 1st and 3rd appellants; but the prosecution version in no way accounts for the equally undoubted